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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

JESSE BROWN, SECRETARY OF VETERANS AFFAIRS,
Petitioner,
v.
FRED P. GARDNER,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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BRIEF FOR THE NATIONAL VETERANS LEGAL SERVICES PROJECT AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

A federal statute initially enacted in 1924 as part of the World War Veterans Act, 43 Stat. 607, provides disability compensation to veterans injured as a result of medical or surgical treatment administered by Department of Veterans Affairs ("VA") personnel:

> Where any veteran shall have suffered an injury, or an aggravation of an injury, as the result of . . . medical or surgical treatment . . . and not the result of such veteran's own willful misconduct, and such injury or aggravation results in additional disability to . . . such veteran, disability or death compensation under this chapter . . . shall be awarded in the same manner as if such disability, aggravation, or death were service-connected.

38 U.S.C. § 1151 (1991 & Supp. IV 1994). A VA regulation limits compensation under the statute to cases in which the additional disability resulted from an "accident" or "carelessness, negligence, lack of proper skill, error in judgment, or similar instances of indicated fault" on the part of the VA. 38 C.F.R. § 3.358(c)(3) (1993).

The question in this case is whether the courts below were correct in striking down the VA regulation because its accident/fault limitation is inconsistent with the statute's plain language, which imposes no such restrictions on veterans' right to compensation.

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This brief *amicus curiae* is filed with the consent of the parties, as provided for in the Rules of the Court.

INTEREST OF *AMICUS CURIAE*

The National Veterans Legal Services Project ("NVLSP") is a non-profit, tax-exempt organization which serves as a national support center in the area of veterans law, including disability compensation cases. The NVLSP regularly represents veterans before the Board of Veterans Appeals, the United States Court of Veterans Appeals ("COVA") and the United States Court of Appeals for the Federal Circuit. The NVLSP also publishes informational materials for veterans and their advocates and conducts training events for veterans advocates. The services of the NVLSP are provided to individual veterans and classes of veterans service organi-

zations, state and county veterans offices, community-based veterans organizations, volunteer attorneys, private bar attorneys, legal services attorneys, and other veterans advocates nationwide.

INTRODUCTION AND SUMMARY OF ARGUMENT

The question raised in this case is narrow and straightforward: whether a regulation of the Department of Veterans Affairs ("VA"), 38 C.F.R. § 3.358(c)(3) (1993), is inconsistent with the statute it purports to implement, 38 U.S.C. § 1151 (1993).

Section 1151 provides, in relevant part, that:

> Where any veteran shall have suffered an injury or an aggravation of an injury, as the result of hospitalization, medical or surgical treatment, or the pursuit of a course of vocational rehabilitation . . . awarded under any of the laws administered by the Secretary. . . . not the result of such veteran's own willful misconduct, and such injury or aggravation results in additional disability to or the death of such veteran, disability or death compensation . . . shall be awarded in the same manner as if such disability, aggravation, or death were service-connected.

38 U.S.C. § 1151 (1991).[1] Thus, Section 1151 expressly sets forth four requirements for compensation:

(1) "an injury, or aggravation of an injury;"

[1] The predecessor of Section 1151 was Section 213 of the World War Veterans Act, 1924, ch. 320, 43 Stat. 607, 623. In 1933, Congress repealed the statute, Economy Act of March 20, 1933, ch. 3, tit. I, § 17, 48 Stat. 8, 11, but reenacted it in substantially similar form in 1934, Section 31 of the Act of March 28, 1934, ch. 102, tit. III, 48 Stat. 509, 526, formerly codified at 38 U.S.C. § 501a (1952). The 1934 enactment was recodified at 38 U.S.C. § 351 in 1958, Act of Sept. 2, 1958, Pub. L. No. 85-857, 72 Stat. 1105, 1124, which was redesignated Section 1151 in 1991. Department of Veterans Affairs Codification Act, Pub. L. No. 102-83, § 5, 105 Stat. 378, 406 (1991). For ease of reference, unless otherwise specified, we will refer to the statute throughout this brief as "Section 1151."

(2) "as the result of [VA] hospitalization, medical or surgical treatment, or the pursuit of a course of vocational rehabilitation;"

(3) "not the result of such veteran's own willful misconduct;" and

(4) the "injury or aggravation results in additional disability to or the death of such veteran."

If these four requirements are met, the statute commands that "compensation *shall* be awarded in the same manner as if such disability, aggravation, or death were service-connected." *Id.* (emphasis supplied). Congress specified no other limitations or requirements beyond these four.

VA's interpretation of this statute appears at 38 C.F.R. § 3.358 (1993). After summarizing the statutory language and listing the criteria that govern a determination of whether a veteran has incurred additional disability, the regulation sets forth, at subsection (c), requirements applicable to a determination of the cause of any additional disability. Subsection (c)(3) provides that:

> Compensation is not payable for either the contemplated or foreseeable after results of approved medical or surgical care properly administered, no matter how remote, in the absence of a showing that additional disability or death proximately resulted through carelessness, negligence, lack of proper skill, error in judgment, or similar instances of indicated fault on the part of [VA]. However, compensation is payable in the event of an "accident" (an unforeseen, untoward event), causing additional disability or death proximately resulting from [VA] hospitalization or medical or surgical care.

38 C.F.R. § 3.358(c)(3) (1993). At the center of the instant controversy is the requirement of the VA regulation that, to obtain compensation, a veteran must prove that his or her additional disability resulted from an "accident" or "carelessness, negligence, lack of proper skill, error in judgment, or similar instances of indicated fault" on the part of VA. 38 C.F.R. § 3.358(c)(3) (1993).

Fairly read, there is nothing in the plain language of Section 1151 and its four requirements to indicate that Congress intended to require, as a predicate for benefits under that provision, a showing of an "accident" or "carelessness," "negligence" or "fault" on the part of the VA. None of those terms appear on the face of the statute. By contrast, the statute does expressly address fault on the part of the veteran, explicitly precluding compensation to veterans whose disability is the result of their "own willful misconduct." "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983).

Application of this principle in this case is reinforced by the fact that, both prior and subsequent to 1924 (when the predecessor to Section 1151 was enacted), when Congress has intended to impose a fault-based system of liability in other contexts, it has done so explicitly by using terms such as "negligence." See, *e.g.*, Federal Employers' Liability Act, 45 U.S.C. § 51 (1986); Federal Tort Claims Act, 28 U.S.C. §§ 2672, 2674 (1986); Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 905(b) (1986). If Congress had wanted to impose VA fault as a predicate for compensation under Section 1151, it could have and would have done so. However, it did not.

Notwithstanding these circumstances, the Secretary argues that five words in Section 1151—"injury" and "as a result of"—potentially carry some connotation of fault or, at very least, create some interpretive ambiguity. These arguments are demonstrably meritless.

The Secretary's argument with respect to the term "injury" would require this Court to find that Congress intended the term to have two different meanings within

the same sentence of Section 1151. Section 1151 commences with the phrase: "Where any veteran shall have suffered an injury, or an aggravation of an injury . . ." The Secretary concedes that the phrase "aggravation of an injury" relates to a veteran's condition prior to any VA treatment at issue and thus carries with it no connotation of fault. Pet. Br. 15 n.8. The Secretary's argument that Congress intended to impose a fault-based compensation system when it employed the term "injury" six words earlier in the same sentence, flatly violates the principle that, when identical words appear in different parts of the same act, they are intended to have the same meaning. The Secretary can point to nothing in the statute indicating that Congress intended to deviate from this familiar principle.

The Secretary's argument that the phrase "as a result of" may create a fault-based compensation system is equally flawed. As the court of appeals correctly found, read literally, the words "as a result of" create merely a *causation* requirement. Indeed, the VA's own regulations (38 C.F.R. § 3.358(c)(6) (1993))—which require *no* showing of fault in connection with an injury "resulting from . . . the pursuit of vocational rehabilitation"—demonstrate that not even the VA believes in this argument.

Further, the Secretary's argument that the terms "injury" or "as a result of" imply a fault-based compensation system under Section 1151 is also belied by the fact that nearly identical terms appear in the veterans compensation provisions applicable to service-connected disability (38 U.S.C. §§ 1110, 1131 (1991)), as to which the Secretary concedes a *no*-fault system applies. Congress could have stated explicitly that a different compensation system was to apply under Section 1151 to compensation for non-service-connected conditions. It did not. To the contrary, it stated that compensation under Section 1151 "shall be awarded in the same manner as if such disability, aggravation, or death were service-connected."

Finally, the simple and straight-forward language of the statute is reinforced by the overall structure of the statutory scheme of veterans benefits. As this Court described in detail in *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985), Congress intended the VA benefits system to be nonadversarial and informal—a system totally at odds with the adversarial and formal fault-based system that the Secretary claims can be read into Section 1151.

Notwithstanding the plain language of Section 1151, the Secretary advances four arguments in support of his claim that Congress intended a fault-based system in enacting the statute. The Secretary argues that (1) the legislative history surrounding the enactment of Section 1151, (2) the VA's purportedly contemporaneous interpretation of the statute shortly after its enactment, (3) the reenactment of the statute in 1934, and (4) congressional silence on the issue subsequent to 1934, all support the VA's fault-based regulation. None of the factors asserted by the Secretary, however, justifies ignoring the plain meaning of the statute.

The Secretary asserts that the legislative history surrounding the enactment of Section 1151 supports the conclusion that Congress intended to impose a fault-based system. As the Secretary concedes, however, at least some of the legislative history directly supports the conclusion that Congress never intended to impose on injured veterans the burden of proving VA fault or negligence. Under these circumstances, the Secretary has not made the "extraordinary showing of contrary intentions. . . [that] would justify" ignoring the plain language of the statute. *Garcia* v. *United States*, 469 U.S. 70, 75 (1984).

The Secretary next argues that VA's interpretation of Section 1151 should be given considerable weight because it was made contemporaneously with the enactment of the statute in 1924. To the contrary, the initial decisions to come out of the VA field offices in the two years following enactment of the statute were consistent with the notion that fault was *not* an element of a claim for benefits. Further, the VA General Counsel opinions and VA regulations that followed these initial decisions show a pattern of varied interpretation and inconsistent application and, accordingly, do not provide any basis for modifying or ignoring the language of the statute.

For similar reasons, the Secretary's argument that the 1934 reenactment of Section 1151 represented Congress' implicit endorsement of the VA's fault requirement is also baseless. To begin with, there is nothing to indicate that Congress actually considered the fault/no fault issue in 1934. Moreover, given the inconsistency of the VA's interpretations in the prior decade, it cannot be said that there was any "uniform construction which Congress might have endorsed." *Fogerty* v. *Fantasy, Inc.*, 114 S. Ct. 1023, 1032 (1994).

Finally, the Secretary urges this Court to find that Congress acquiesced to the VA's interpretation because it remained silent on the fault/no fault issue when it amended the statute subsequent to 1934. As this Court has recently held, these types of acquiescence arguments "deserve little weight in the interpretive process." *Central Bank* v. *First Interstate Bank*, 114 S. Ct. 1439, 1453 (1994). This principle clearly applies here where the Secretary offers no evidence from which to conclude that Congress ever considered the VA's regulation in the process of amending the statute.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE STATUTE PRECLUDES IMPOSITION OF A "FAULT" OR "ACCIDENT" REQUIREMENT AS A PREDICATE FOR BENEFITS.

A. "The starting point in interpreting a statute is its language, for 'if the intent of Congress is clear, that is the end of the matter.'" *Good Samaritan Hosp.* v. *Shalala*, 113 S. Ct. 2151, 2157 (1993) (quoting *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984)); see also *Community for Creative Non-Violence* v. *Reid*, 490 U.S. 730, 739 (1989). In order to derive the statute's plain meaning, the court must examine the specific language at issue and the overall structure of the statute. *Bethesda Hosp. Ass'n* v. *Bowen*, 485 U.S. 399, 403-05 (1988).

Section 1151 commands that compensation "shall be awarded in the same manner" as compensation is awarded for service-connected disabilities [2] if the four requirements (*i.e.*, injury, caused by VA treatment, not due to veteran's fault, and resulting in disability or death) are met. The specific language of Section 1151 does not contain even the faintest hint of a legislative expression that fault by VA personnel or an accident is a prerequisite to obtaining compensation for additional disability. Indeed, while arguing that Congress meant to create a fault-based system in this very litigation, the Secretary previously conceded that Section 1151 on its face does *not* include the "fault" or "accident" requirement imposed by the regulation. See Appellee's Response to

[2] "Service-connected disabilities" refer to disabilities incurred during, or as a result of, an individual's military service. Injury caused by VA treatment for such disabilities is compensable under provisions other than Section 1151. *See* 38 U.S.C. §§ 1110, 1131 (1991). Section 1151 provides identical compensation for veterans disabilities due to VA treatment for conditions *not* attributable to, or incurred during, active military service.

Order of the Court to File a Supplemental Memorandum, COVA No. 90-120, at 8-9 (Vet. App. filed Feb. 25, 1991) ("the plain language of that provision would suggest" that Congress intended to "authorize the payment of compensation for a veteran's additional disability arising from *any* unfortunate circumstance arising during hospitalization") (emphasis in original). See also VA General Counsel's Op. No. 99-90 (Dec. 24, 1990), J.A. 41 ("literal" interpretation would require "strict liability"). In short, the plain language of Section 1151 provides no authority for the VA fault or accident requirement that the VA engrafted through its implementing regulation. Since an agency cannot, under the rubric of regulation, restrict the scope of a statute, *Neuberger* v. *Commissioner*, 311 U.S. 83, 89 (1940), the Secretary's regulation requiring the veteran to prove fault or accident is invalid. *Chevron, U.S.A., Inc.*, v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) (where the plain meaning of the statute conflicts with the administrative regulation, the regulation is invalid).

The plain language of the statute demonstrates that Congress considered and expressly addressed the issue of fault and that omission of VA fault in the statute's language is no oversight. The statute addresses the issue of fault, but only by restricting the universe of veterans who may seek compensation to those whose additional disability is not the result of their "own willful misconduct." 38 U.S.C. § 1151 (1991). The fact that Congress inserted this limitation shows that Congress considered the issue of fault while drafting the statute and determined that, although fault of the veteran was relevant to a determination of eligibility for compensation, the fault of VA personnel in causing the injury was not.

There is no basis for assuming that Congress overlooked a requirement of fault on the part of the VA or intended to imply such a requirement where it carefully crafted the exclusion to compensation based on the

"willful misconduct" of the veteran. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983); see also *United Sav. Ass'n* v. *Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988). Thus, in this case, Congress is presumed to know what it was doing when it barred recovery for the veteran's willful misconduct but indicated no other element of fault.

This conclusion is reinforced by the fact that when Congress has intended to impose a fault-based system of liability in other contexts, it has done so explicitly. See, *e.g.*, Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 (1986) (enacted in 1908 and providing that "every common carrier by railroad . . . shall be liable in damages to any person suffering injury . . . resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its . . . equipment"); Jones Act, 46 U.S.C. § 688 (1975) (enacted in 1920 and providing a cause of action for damages to "any seaman" injured "in the course of his employment" in the same manner as in "cases of personal injury to railway employees" under FELA); Federal Tort Claims Act, 28 U.S.C. § 2672 (1986) (enacted in 1948 and providing for administrative adjustment of claims against the United States for "personal injury or death caused by the negligent or wrongful act or omission of any employee of the government"); Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 905(b) (1986) (enacted in 1972 and providing that "[i]n the event of injury to a person covered under this Chapter caused by the negligence of a vessel, then such person . . . may bring an action against such vessel as a third party"); Act for the Better Security of Life on Board of Vessels, 46 U.S.C. § 491 (1958) (enacted in 1871 and providing that "any person sustaining loss or injury through the carelessness, negligence, or willful misconduct of any master, mate, engineer, or pilot" may sue those individuals and "recover damages for any such injury").

In short, Congress knew how to impose a fault-based compensation standard when it chose to do so. If, as the Secretary claims, Congress intended to limit veterans benefits to instances involving an "accident" or VA "fault," "carelessness" or "negligence," it would have used those words in the statutory text. See *Central Bank*, 114 S. Ct. at 1448; *Pinter* v. *Dahl*, 486 U.S. 622, 650 (1988). But, it did not.

B. In his brief to this Court, the Secretary argues—for the first time—that the term "injury" may carry with it some connotation of fault. Pet. Br. 13-16. The Secretary's failure to raise this argument previously is easily understood: his argument would require the Court to hold that Congress intended the word "injury" to have two different meanings within the *same sentence* contained in Section 1151.

Section 1151 begins with the phrase: "where any veteran shall have suffered an injury, or an aggravation of an injury . . ." As the Secretary concedes (Pet. Br. 15 n.8), the phrase "aggravation of an injury" relates to a veteran's condition prior to treatment and thus carries with it *no* requirement of fault. Yet, the Secretary argues that, when Congress employed the term "injury" six words earlier, it intended to impose a fault-based compensation system. The Secretary cannot cite to anything in the statute that supports this newly asserted interpretation. To the contrary, this Court has made clear that "identical words used in different parts of the same act are intended to have the same meaning." *Sorenson* v. *Secretary of Treasury*, 475 U.S. 851, 860 (1986); see also *Morrison-Knudsen Const. Co.* v. *Director*, 461 U.S. 624, 633 (1983) (same). *A fortiori*, this familiar prin-

ciple of statutory construction applies when "identical words" are used twice in the same sentence.

The Secretary next argues (Pet. Br. 16-20) that the phrase "as the result of" may also carry some connotation of fault. Again, however, the Secretary points to nothing else in the statute which supports the claim that the phrase is meant to introduce fault into the statutory scheme. To the contrary, as the court of appeals correctly observed, the phrase—literally read—creates only a *causation* requirement. Pet. App. 8a.

The soundness of the court of appeals' conclusion—in contrast to the Secretary's proposed interpretation—is squarely supported by reading the phrase "as a result of" in its full statutory context. See *King* v. *St. Vincent's Hosp.*, 112 S. Ct. 570, 574 (1991) ("meaning of statutory language, plain or not, depends on context"). Section 1151 addresses an injury or an aggravation of an injury "as a result of" four circumstances: "hospitalization, medical or surgical treatment, or the pursuit of vocational rehabilitation. . . ." If the phrase "as a result of" was meant to introduce VA fault into Section 1151, that fault requirement would apply to *all four* circumstances, including "pursuit of vocational rehabilitation." However, if a showing of VA fault were being required, Congress would not have referred to "the *pursuit* [by the veteran] of vocational rehabilitation" but rather to "the *provision* [by the VA] of vocational rehabilitation." Indeed, the VA's regulations make clear that the Secretary does *not* apply a fault requirement with respect to an injury "as a result of . . . the pursuit of a course of vocational rehabilitation," but requires only causal connection between vocational rehabilitation and the veteran's injury. See 38 C.F.R. § 3.358(c)(6) (1993) ("compensation for disability resulting from the pursuit of vocational rehabilitation is not payable unless there is established a direct (proximate) causal connection between the injury or aggravation of an existing injury and some

essential activity or function which is within the scope of the vocational rehabilitation course"). See also 36 Op. Att'y Gen. 61 (1929) (compensation for injury incurred while in vocational training requires only showing causation similar to application of Workmen's Compensation Acts).[8]

Moreover, the Secretary's argument that the terms "injury" or "as a result of" imply a fault-based compensation system under Section 1151 is also belied by the fact that similar terms appear in connection with other veterans compensation provisions as to which the Secretary concedes a no-fault system applies. The VA administers two major disability benefits programs for veterans. The first program is designed to compensate veterans who were injured while in the service. Such benefits are often referred to as "service-connected" benefits. See 38 U.S.C. §§ 1110, 1131 (1991). Section 1110 provides a guarantee of compensation to active military personnel for "disability *resulting* from personal *injury* suffered or disease contracted in line of duty . . . during a period of war." (Emphasis supplied.) Similarly, Section 1131 provides a guarantee of compensation for active military personnel for "disability *resulting* from personal *injury* suffered . . . during other than a period of war." (Emphasis supplied.) The second program—the one involved in this case—is designed to provide benefits to veterans no longer in service who are injured as a result of VA medical treatment, vocational rehabilitation, or hospitalization. 38 U.S.C. § 1151 (1991). This program covers treatment for non-service-connected conditions. Under Section 1151, benefits are

[8] The Secretary makes much ado about a statement by the respondent that "[s]ection 1151 would not provide benefits for an amputation necessary to remove a gangrenous leg." Pet. Br. 17-18. The respondent's common sense application of Section 1151 to this hypothetical in no way vindicates the "fault" or "accident" requirement of the VA's regulation. Compensation under Section 1151 would not be appropriate in this hypothetical because the loss of the leg was not merely a reasonably foreseeable risk—but the *intended consequence* of the surgical procedure.

"awarded in the same manner as if such disability . . . were service-connected." These benefits are sometimes referred to as "quasi-service-connected benefits."

Although both Sections 1110 and 1131—similar to Section 1151—contain the allegedly ambiguous words "injury" and "resulting," the Secretary concedes that, under these statutes, a veteran who suffers a surgical injury for treatment of a service-connected condition receives compensation *without* proof of fault. Pet. Br. 8 n.3. See 38 C.F.R. § 3.310(a) (1993). In an attempt to justify his disparate interpretation of similarly structured statutes, the Secretary argues:

> The basic premise of compensation for service-connected disabilities is that the government will assume responsibility for conditions contracted by service members "in line of duty." . . . Compensation under Section 1151, on the other hand, is not based on a general assumption of national responsibility for the veteran's underlying condition, but on some specific connection between treatment rendered by the VA and a post-treatment disability. It is not surprising that Congress would require a showing of fault or "accident" before assuming responsibility for the latter class of cases.

Pet. Br. 15 n.8.

However, once again there is no authority—nor does the Secretary refer to any—which supports even an inference that Congress had this distinction in mind in 1924 or at any time in reeancting Section 1151. Rather, even the Secretary's own General Counsel has stated that Congress did *not* intend a distinction between recipients of so-called "quasi-service-connected" benefits under Section 1151 and recipients of benefits under Section 1110 and 1131. VA General Counsel's Op. No. 80-90 (July 18, 1990), J.A. 24.[4]

[4] Before the Court of Veterans Appeals, the Secretary argued that applying the same no-fault standard to both service-connected benefits (under Sections 1110 and 1131) and quasi-service-connected benefits (under Section 1151) would lead to absurd results. The Secretary apparently has abandoned this argument in this Court—with good reason. The circumstances of Section 1151 beneficiaries can often be virtually identical to beneficiaries under Sections 1110 or 1131. As the Secretary notes (Pet. Br. 15 n.8), in defining what constitutes "line of duty" under either Section 1110 or 1131, Congress has required only a temporal relationship between duty status and the onset of a condition. *See* 38 U.S.C. § 105 (1991). Thus, for example, if Mr. Gardner—while on active duty but on leave—had been injured while surfing in Hawaii and suffered a herniated disc, any "bad result" of the subsequent in-service or post-service surgery would be treated as service-connected and compensated on a no-fault basis.

Prior to 1924, a veteran treated for a service-connected condition could obtain compensation for any surgical injury that resulted without proof of fault. With the 1924 Act, Congress simply put the veteran who suffered disability or death from VA treatment for a non-service-connected condition on a par with the veteran who suffered disability or death from a service-connected condition. Rather than incorporating the common law or any other fault-based system, Congress merely extended the no-fault compensation system already applicable to service-connected disabilities. If Congress had intended to preclude payments under Section 1151 in the absence of fault or "accident," it would have expressed recognition of the inconsistency in the standards applicable in these veterans benefit provisions by specifically imposing a fault requirement. Thus, the "context of this statute actually supports the conclusion that Congress meant what [Section 1151] says." *Conroy* v. *Aniskoff*, 113 S. Ct. 1562, 1565 (1993).

C. The Secretary further argues that his "view that the statute requires legal causation is also consistent with the common law of medical malpractice" and that the "no-fault standard advocated by respondent and the court of appeals, on the other hand, departs sharply from the common-law principles of recovery for adverse medical

outcomes." Pet. Br. 19. The Secretary's argument *assumes*—again without citing any support from the statute—that Congress intended to adopt a common-law liability standard in enacting Section 1151 and its predecessors. To the contrary, Section 1151 expressly states that if its four requirements are met, compensation "shall be awarded in the same manner as if such disability . . . were service-connected." As just described, compensation for service-connected conditions is *not* governed by a fault-based or common law system, but is awarded on a no-fault basis. Where Congress wished to incorporate a common law fault standard, such as under FELA, it knew how to do so. In Section 1151, however, Congress expressly determined *not* to adopt the common law as its model, but instead to adopt the already existing statutory scheme of compensation for service-connected disabilities.

Moreover, the Secretary's argument that Congress intended to adopt a fault-based system linked to the common law in enacting Section 1151 also conflicts with the overall statutory scheme governing the provision of veterans benefits. The adjudication of claims for benefits (under Sections 1110, 1131 *and* 1151) is designed to be both informal and nonadversarial. *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 323-24 (1985);[5] see also *Littke* v. *Derwinski*, 1 Vet. App. 90, 91 (1990) ("VA takes pride in operating a system of processing and adjudicating claims for benefits that is both informal and nonadversarial"). Congress designed the adjudicatory system for veterans benefits to be solicitous of veterans' welfare and not to impose substantial or complex evidentiary burdens on the veterans. The adjudicatory system set up by Congress, including claims filed under

[5] In *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985), this Court held that a $10 cap on attorney's fees for cases brought before the regional boards did not violate the First Amendment or the Due Process Clause. The Court found the limitation on fees to be consistent with a system characterized as both "informal and nonadversarial." 473 U.S. at 323.

Section 1151, is not at all consistent with the fault-based system that the Secretary claims is created under that statute.

The claims process is commenced by the filing of a claim form by the veteran at one of the VA's regional offices. 38 U.S.C. §§ 5101-5103 (1991). In most cases, the claim is referred to a regional rating board, usually comprised of three people, including a medical specialist. Hearings before the regional rating boards are "ex parte in nature," 38 C.F.R. § 3.103(a) (1993), and "no Government official appears in opposition." *Walters*, 473 U.S. at 309-10. In fact, in most cases, recovery of benefits is "swift [and] efficient," *Stencel Aero Eng'g Corp.* v. *United States*, 431 U.S. 666, 673 (1977), and "normally requires no litigation." *Feres* v. *United States*, 340 U.S. 135, 145 (1950). This is consistent with the notion that the whole claims process operates under a congressionally created umbrella of paternalistic concern for this country's veterans. *Walters*, 473 U.S. at 323-24.

The VA has certain duties and obligations designed to enable the veteran to effectively present his claim. First, the VA has the duty to assist any claimant who has submitted a well-grounded claim in developing the facts pertinent to his claim. *Littke*, 1 Vet. App. at 91. This duty to assist is neither optional nor discretionary and requires the VA to conduct a thorough and contemporaneous medical evaluation, *Green* v. *Derwinski*, 1 Vet. App. 121, 124 (1991), order a medical examination by a specialist, if required, *Hyder* v. *Derwinski*, 1 Vet. App. 221, 224 (1991), procure relevant medical records from private physicians, *Littke*, 1 Vet. App. at 92, and obtain all relevant records in the possession of any federal department or agency. *Id.* Second, the VA is required to apply a broad and liberal interpretation to its rules, 38 C.F.R. § 3.03(a) (1993), and to infer issues or claims not expressly raised by the claimant. *Akles* v. *Derwinski*, 1 Vet. App. 118, 121 (1991). Finally, the "board

is directed by regulation to resolve all reasonable doubts in favor of the claimant." *Walters*, 473 U.S. at 310; see also *Gilbert* v. *Derwinski*, 1 Vet. App. 49, 54 (1990) (claimant prevails where "there is an approximate balance of positive and negative evidence").

If the board issues an unfavorable opinion for the veteran, he or she may file a notice of disagreement with the regional office. If upon reconsideration the regional office adheres to the original decision, the agency must issue a "statement of the case" which contains a summary of the evidence, the applicable law and regulations upon which the decision was based, and the reasons for the denial of the claim. See 38 U.S.C. § 7105(d) (1991). The claimant may then appeal to the Board of Veterans Appeals ("BVA"). The hearings in front of the BVA "are [also] ex parte, there is no formal questioning or cross-examination, and no formal rules of evidence apply." *Walters*, 473 U.S. at 311. Indeed, since there is no formal *res judicata* effect or statute of limitations, the appellant may argue new theories of entitlement and present claims for different benefits up until the time the BVA makes its final decision. *Myers* v. *Derwinski*, 1 Vet. App. 127, 129 (1991).

The fault-based standard the Secretary claims is part of Section 1151 is clearly incompatible with the informal and nonadversarial adjudicatory system created under that statute. It is inconceivable that Congress would have combined a VA fault requirement, which inherently would impose a heavy and complex evidentiary burden on legally untutored veterans, with a system in which a veteran was forbidden to pay an attorney more than $10. Certainly, given the informal and nonadversarial statutory scheme for veterans benefits, in the absence of an explicit indication from Congress that it was imposing a fault-based system, none should be inferred.[6]

[6] The Secretary's argument that Congress intended to create a fault-based system in enacting Section 1151 is also belied by the enactment of the Federal Tort Claims Act ("FTCA"). The FTCA was not enacted until 1946 (60 Stat. 842, 843 (1946) (codified at 28 U.S.C. §§ 1346(b), 2671 *et seq.* (1982))). Subsequently, Congress made clear that the FTCA was the *exclusive* remedy for malpractice actions against the VA. 38 U.S.C. § 7316(a)(1)(B) (1991 & Supp. IV 1994). The exclusivity of the FTCA regime as a tort-based remedy against the VA further suggests that Section 1151 does not include a fault-based standard.

II. EACH OF THE THEORIES ADVANCED BY VA FOR IGNORING THE PLAIN MEANING OF SECTION 1151 IS MERITLESS.

As demonstrated above, the "statutory command of § [1151] is unambiguous, unequivocal, and unlimited." *Conroy* v. *Aniskoff*, 113 S. Ct. 1562, 1564 (1993). Since this is the case, "judicial inquiry is complete, except in 'rare and exceptional circumstances.'" *Rubin* v. *United States*, 449 U.S. 424 (1981) (quoting *TVA* v. *Hill*, 437 U.S. 153, 187 n.33 (1978)). The Secretary attempts to skirt around the plain meaning of the statute by asserting that (1) the legislative history surrounding the enactment of Section 1151, (2) purportedly contemporaneous interpretations of the statute by the VA, (3) subsequent reenactment of the statute, and (4) congressional silence on the issue after 1934 all support a conclusion that Congress contemplated a fault-based system in enacting Section 1151. None of the theories advanced by the government changes the plain language of the statute or permits that language to be ignored or modified.[7]

[7] Additionally, the Secretary attempts to find support for his argument with vague references to policy considerations. *E.g.*, Pet. Br. 15 n.8, 18-19, 41. The Court has made clear that such arguments "cannot override [our] interpretation of the Act's text and structure," except to the extent that they might help to show that "adherence to the text and structure would lead to a result 'so bizarre' that Congress could not have intended it." *Central Bank* v. *First Interstate Bank*, 114 S. Ct. 1439, 1442 (1994) (quoting *Demarest* v. *Manspeaker*, 498 U.S. 184, 191 (1991)). The Secretary has apparently abandoned his prior argument that a no-fault interpretation of Section 1151 would lead to impermissibly absurd results. *See supra* note 3.

A. Although this Court may "turn to the legislative history as an additional tool of analysis, [it does] so with the recognition that only the most extraordinary showing of contrary intentions from [the] data would justify a limitation on the 'plain meaning' of the statutory language." *Garcia* v. *United States*, 469 U.S. 70, 75 (1984); see also *Consumer Prod. Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) (indicating that where there is no "clearly expressed legislative intention to the contrary," the words of the statute "must ordinarily be regarded as conclusive"). Although, as the court of appeals recognized, " 'recourse to the legislative history of Section 1151 is unnecessary in light of the plain meaning of the statutory text' " (Pet. App. 9a) (quoting *Darby* v. *Cisneros*, 113 S. Ct. 2539, 2545 (1993)), the legislative history of the 1924 Act reinforces the plain language in Section 1151. See *United States* v. *James*, 478 U.S. 597, 606 (1986).

Section 213 of the World War Veterans Act, 1924, ch. 320, 43 Stat. 607, is the predecessor of Section 1151. Section 213, designed to be remedial legislation, was presented as a bill to amend the War Risk Insurance Act. *Hearings Before the House Committee on World War Veterans' Legislation*, 68th Cong., 1st Sess. 113 (1924) ("1924 Hearings"). As an initial matter, the fact that the statute was part of an insurance scheme supports the conclusion that Congress did not intend for veterans to prove an element of a fault in order to receive Section 1151 benefits.

The comments of General Frank T. Hines, Director of the Veterans Bureau from 1923 until 1945, are instructive. In introducing the legislation, he stated:

> [I]t seems to me manifestly unjust, that in good faith the man undergoes an operation, *the doctor does the best he can and without neglect* . . . [w]ith the best medical advice, and still at the end of a certain period we find the man has a greater disability than he originally started with, and we have no way of correcting in any measure that condition.

1924 Hearings at 114 (emphasis supplied). Similarly, in a letter to the Chairman of the Committee, General Hines wrote:

> I concur in the principle that authority should exist for compensating the cases of disability due to the hazards of training upon the general theory and principle of the workmen's compensation act. I would extend the principle beyond this particular proposal to include also ratable disabilities *incurred without fault and due to the hazards of medical and surgical treatment.*

Id. at 122 (emphasis supplied). The whole compensation scheme rests upon the notion that the "Government having undertaken to bestow a benefit, has, in fact, inflicted a loss." *Id.* at 113 (statement of General Hines).

The Secretary points to comments made by General Hines where he notes that compensation would be authorized for those injured "as the result of accident or negligence of treatment or unskillfulness." *Id.* Although these comments make it clear that there would be compensation in the event of VA fault or negligence, the comments do not suggest that compensation would be limited to such circumstances. Indeed, such a conclusion would be flatly inconsistent with the comments of General Hines quoted above.

Based on these comments, the Secretary concedes (Pet. Br. 26) that "parts of the 1924 legislative history suggest that, Congress may have contemplated compensation for disabilities caused by medical treatment even where 'the doctor does the best he can * * * without neglect * * * and with the best medical advice' " (quoting Pet. App. 11a). The Secretary further concedes that "it is difficult to draw any confident conclusion about the in-

tended scope of Section 213 on the basis of the pre-enactment legislative history alone." Pet. Br. 26. What may be concluded with confidence is that the plain language of the statute must be given effect since there is no "clearly expressed legislative intent to the contrary." *NOW* v. *Scheidler*, 114 S. Ct. 798, 806 (1994) (quoting *GTE Sylvania*, 447 U.S. at 108).[8]

B. The Secretary urges this Court to defer to his interpretation of the statute because it allegedly was made contemporaneously with the statute's enactment. In general, where the law is "doubtful and ambiguous . . . , the contemporaneous construction" is entitled to deference. See *Edwards' Lessee* v. *Darby*, 25 U.S. (Wheat.) 206, 210-11 (1827). As discussed above, however, Section 1151 is not doubtful or ambiguous—in fact, it is very clear: the veteran will be compensated for injuries sustained as a result of VA treatment or programs. See *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984) (agency only entitled to deference concerning its statutory interpretation where the statutory language has "left a gap" or is ambiguous).

Further, the record does not support the Secretary's assertion that the VA contemporaneously *and consistently* interpreted the 1924 statute to require a showing of fault or accident. There were various inconsistent interpretations and applications of Section 213 within the first 10 years of its enactment, and beyond.

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[8] On August 4, 1978, the VA proposed a regulation for public notice and comment for the first time in its history. *See* 43 Fed. Reg. 34505 (1978). The proposed amendment to 38 C.F.R. § 3.358(c)(3) would have provided benefits "without regard to whether there was fault or negligence of [sic] the part of the Veterans Administration." 43 Fed. Reg. 34505 (1978). This change was being proposed after a "careful study of the legislative history of 38 U.S.C. [§] 351." *Id.* However, VA never published any regulation to this effect.

To begin with, as the Secretary concedes, VA field offices adjudicated claims on a no-fault basis for at least two years following Section 213's enactment. Pet. Br. 27. And later, in a 1929 adjudication, 59 VA General Counsel's Op. 458 (1929), benefits were awarded to a veteran under Section 213 of the 1924 Act *without* consideration of fault. In determining that a veteran was entitled to compensation for an injury resulting from hospitalization, the General Counsel stated, "[t]he prime place to go for evidence of the intention of Congress is the statute, which, in this case, is quite without ambiguity, as far as this Service can discern." *Id.* In addition, a 1929 Attorney General opinion not only made no mention of a fault requirement but interpreted the words in the statute in a manner that would be consistent with Workmen's Compensation Acts, *i.e.*, without consideration of fault. 36 Op. Att'y. Gen. 61 (1929).

The first VA regulation requiring proof of any element beside causation was not issued until two years after the enactment of Section 213. See VA Regulation No. 137 (June 11, 1926) (compensation was available for additional injury resulting from "improperly given" treatment). Moreover, the regulations promulgated in the next couple of years continued to be in flux. In 1926, satisfactory evidence of "malpractice, malfeasance, or misfeasance" had to exist for a disability to be compensable. VA Regulation No. 157 (Sept. 15, 1926). A year later the malpractice language was replaced with a less strict standard. VA Regulation No. 167 (Feb. 21, 1927) (benefits provided for all injuries except those which were "[t]he usual after results of approved medical care and treatment properly administered").

In attempting to explain the genesis of the uneven course of administrative implementation of the statute during the 1920's and 1930's, the VA General Counsel stated that "[s]ome of the difficulty seems to have resulted from the fact that administrative officials have not construed the language of the statute literally in determining whether

benefits were payable for additional disability or death due to hospitalization, medical or surgical treatment." VA General Counsel's Op. No. 2-78 (Oct. 25, 1978), J.A. 18. The non-uniform administrative interpretation of the statute in the years immediately following its enactment clearly provides no basis for modifying or ignoring the plain language of the statute. Indeed, if deference to administrative interpretation is due at all, it is due to the first field office adjudications which did not require fault on the part of the Veterans Bureau. *Id.*, J.A. 16. Those determinations were made most closely upon the passage of Section 213 when all of the circumstances surrounding its enactment were well known. See *Zuber* v. *Allen*, 396 U.S. 168, 192 (1969); *United States* v. *American Trucking Ass'n*, 310 U.S. 534, 549 (1940).[9]

C. The Secretary also argues that, because Congress reenacted a predecessor of Section 1151 in 1934, Congress adopted the VA's interpretation of the statute. Before the Court will apply the reenactment doctrine and adhere to the interpretation developed in the courts or an agency, it must find that there has been a consistent construction for Congress to endorse. *Central Bank* v. *First Interstate Bank*, 114 S. Ct. 1439, 1452 (1994); *Fogerty* v. *Fantasy, Inc.*, 114 S. Ct. 1023, 1032-33 (1994). As indicated above, the inconsistencies in the VA interpretations are "hardly the sort of uniform construction which Congress might have endorsed." *Id.* at 1032.

Moreover, it is well established that congressional reenactment of a statute, without more, does not prove that Congress approved an agency's implementing regulation. *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955); *Biddle* v. *Commissioner*, 302 U.S. 573, 582 (1938); *Koshland* v. *Helvering*, 298 U.S. 441, 447 (1936). This principle is particularly true when "there is nothing to indicate that [the regulation] was ever called to the attention of Congress" and reenactment "was not accompanied by any congressional discussion which throws light on [the statute's] intended scope." *United States* v. *Calamaro*, 354 U.S. 351, 359 (1957).

The Secretary points out that, in 1930-31, the House Committee on Invalid Pensions undertook a study of the then existing benefits structure. Pet. Br. 32. The Secretary notes that the Chairman of the Committee compiled a preliminary report for the Committee members. *Id.* at 32 n.18. The Secretary offers this event as proof that Congress was knowledgeable about the VA's interpretation of Section 1151 before it reenacted the statute. To begin with, this Court has " 'observed on more than one occasion that the interpretation given by one Congress (or a committee Member thereof) to an earlier statute is of little assistance in discerning the meaning of that statute.' " *Central Bank*, 114 S. Ct. at 1452 (quoting *Public Employment Retirement System* v. *Betts*, 492 U.S. 158, 168 (1989)). This principle is clearly applicable here, because the legislative background material referenced by the Secretary does not remotely jus-

[9] Although the Secretary repeatedly stresses that the regulation at issue here has existed for nearly 60 years, it was not reviewable by any court until 1988. In establishing the Court of Veterans Appeals, Congress recognized that the VA has stood "in splendid isolation as the single federal administrative agency whose major functions [we]re explicitly insulated from judicial review." H.R. Rep. No. 963, 100th Cong., 2d Sess. 10 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5782, 5791 (internal quotations omitted). With the passage of the Veterans' Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988) (codified at 38 U.S.C. § 7251 *et seq.*), there was a mechanism in place that (1) provided for judicial review of BVA decisions, (2) required the VA to comply with the Administrative Procedure Act's rulemaking procedures, and (3) required the VA to publish General Counsel Precedent Opinions in the Federal Register. These three fundamental changes opened up the VA adjudicatory process for the first time. The fact that the VA's regulations were "unscrutinized and unscrutinizable" until 1988 (Pet. App. 20a) clearly diminishes any presumption of validity or judicial deference that might otherwise be accorded long-standing administrative interpretations.

tify modifying the language of the statute or support the conclusion that Congress intended a fault-based system.

First, as conceded by the Secretary, the language of the preliminary report "could be read to assume a no-fault interpretation of Section 213." Pet. Br. 32 n.18. Second, although, as the Secretary notes, this report makes it "clear that in 1931 a key congressional committee was well aware of Section 213 and its application to veterans with non-service-connected conditions" (*id.*), the relevant inquiry is not whether Congress was aware of a section that it had enacted, but whether it knew that the VA was imposing a fault requirement on veterans. On this point, the report is, at best, ambiguous—not a surprising circumstance given the uneven course of the VA's implementation of the statute prior to 1934.

Thus, even if the VA thought fault or accident were prerequisites for compensation at the time the statute was reenacted, given the inconsistent applications of the Act prior to 1934, it is unlikely that Congress could have even ascertained with certainty what the VA practice was at the time of reenactment.[10] See *Fogerty*, 114 S. Ct. at 1032-33 (refusing to apply the reenactment principle

[10] Equally unenlightening as definitive proof of congressional intent are the comments of Senator Steiwer, who, in 1934, introduced the amendment which restored the benefits formerly provided under Section 213. Senator Steiwer noted that his proposal was meant to cover cases where "a veteran is disabled by reason of mistreatment on the part of the Government agent, as in a case of malpractice by a Government surgeon." 78 Cong. Rec. 3289 (1934). When asked if Congress was "undertaking to cover cases of malpractice upon the part of physicians," Senator Steiwer responded: "Incidentally we would." *Id.* On the same date, the Senator, in referring to his previous explanation stated, "I shall not explain it further, except to say that the language employed in this amendment, as nearly as I can remember, is a mere reenactment of the law as it existed prior to the Economy Act." *Id.* at 3298. Thus, Senator Steiwer's comments return the issue to square one: what did Congress intend when it enacted Section 213 in 1924. "That issue is our concern here, and we adhere to the statutory text in resolving it." *Central Bank*, 114 S. Ct. at 1453.

where there was no "settled construction" that "Congress might have endorsed"). Consequently, "[i]n such circumstance we consider the reenactment to be without significance." *Calamaro*, 354 U.S. at 359; see *Pierce* v. *Underwood*, 487 U.S. 552, 566-68 (1988).

D. Finally, the Secretary argues that this Court should read into the congressional silence, following the years after reenactment, acquiescence to the Secretary's fault/accident requirements. "[A]s a general matter . . . [approval through silence] arguments deserve little weight in the interpretative process." *Central Bank*, 114 S. Ct. at 1453. Although the statute has been amended several times since 1934, there is no indication that Congress was in any way addressing the question at issue here in any of those instances. Indeed, the Secretary has not offered any evidence that Congress considered the fault issue at any time since the statute's enactment in 1924. Under the circumstances, " '[i]t is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of the . . . statutory interpretation.' " *Central Bank*, 114 S. Ct. at 1452 (quoting *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 175, n.1 (1989)) (inner quotations omitted).[11]

[11] Because VA decisions were not judicially reviewable until 1988, they may not have been as visible as other administrative decisions, which gain public attention both when they are made and then in subsequent judicial review proceedings. The Secretary asserts that "[t]he relevant congressional committees have always paid close attention to the administration of veterans' benefits." Pet. Br. 32. This is clearly not the uniform view of members of Congress. For example, Senator Cranston, in introducing the 1988 legislation which created the Court of Veterans Appeals, noted that:

> Although, the Committee on Veterans' Affairs in both Houses carry out significant oversight of the activities of the VA, the limited resources of the Committees do not allow for thorough review of and congressional action to resolve satisfactorily all of the legal and policy issues arising in such a large and complex agency.

134 Cong. Rec. S16,643 (daily ed. Oct. 18, 1988).

"Congressional inaction cannot amend a duly enacted statute," *Central Bank*, 114 S. Ct. at 1452 (quoting *Patterson*, 491 U.S. at 175 n.1), nor can Congress add to or expand a statute by impliedly approving a regulation which conflicts with the requirements of the underlying statute. See *Leary* v. *United States*, 395 U.S. 6, 24-25 (1969) (citing *Commissioner* v. *Acker*, 361 U.S. 87, 93 (1959)).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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